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File Name: 18a0147p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LIZ LORENA LOPEZ MORENO, *Petitioner-Appellant*, *v.* JASON MICHAEL ZANK, *Defendant-Appellee*.	No. 17-2397

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.
No. 1:17-cv-00732—Paul Lewis Maloney, District Judge.

Argued: June 14, 2018

Decided and Filed: July 19, 2018

Before: KEITH, ROGERS, and BUSH, Circuit Judges

COUNSEL

ARGUED: Amy Grauman, AVANTI LAW GROUP, PLLC, Wyoming, Michigan, for Appellant. Matthew T. Nelson, WARNER NORCROSS & JUDD LLP, Grand Rapids, Michigan, for Appellee. **ON BRIEF:** Amy Grauman, Robert Anthony Alvarez, AVANTI

LAW GROUP, PLLC, Wyoming, Michigan, for Appellant. Matthew T. Nelson, Peter M. Kulas-Dominguez, Paul H. Beach, WARNER NORCROSS & JUDD LLP, Grand Rapids, Michigan, for Appellee.

OPINION

ROGERS, Circuit Judge. In this case under the Hague Convention on the Civil Aspects of International Child Abduction, a mother seeks the return of a child to Ecuador, the place where the child had become accustomed to living, from a stay with the father in the United States that the mother, at least, intended to be temporary. Relief is available under the Convention only if Ecuador is the habitual residence of the child. The district court held that the mother's original abduction of the child to Ecuador years earlier meant that Ecuador could not be the child's habitual residence. However, the father had not followed through with Hague Convention procedures in Ecuador following the original abduction. Reversal is required because the proper remedy for the initial kidnapping to Ecuador was a Hague Convention petition filed in Ecuador, subject to applicable limitations and defenses, rather than the self-help remedy of (in effect) later re-kidnapping back to the United States. A remand is also necessary, on which various treaty-based defenses may be raised.

The child at issue here, BLZ, was born in 2006 in Michigan to the then-married couple of Jason Zank, a citizen of the United States, and Liz Lopez Moreno, a citizen of Ecuador. Zank and Lopez Moreno divorced in July 2009. Their divorce decree granted

Zank and Lopez Moreno joint legal and physical custody of BLZ, with alternate weekly custody and twice-weekly visitation by each parent. It also prohibited Lopez Moreno from taking BLZ to Ecuador without prior notice to Zank.

The concerns implicit in the divorce decree turned out to have been well-founded. In December 2009, Lopez Moreno took BLZ to Ecuador with her, in violation of the divorce decree. Zank sought and received a court order from a Michigan state court, the Montcalm County Circuit Court, temporarily granting him sole legal and physical custody of BLZ. Because this proceeding was ex parte, Lopez Moreno was not present during that action.

Once Zank discovered that BLZ had been taken to Ecuador, he contacted the U.S. Department of State and filled out a Hague Convention petition with the United States Embassy in Ecuador. Zank did not complete the Hague Convention process, however, in that he did not file the petition with the Ecuadorian courts, or otherwise attempt to secure the return of BLZ through procedures in Ecuador. Zank testified that he had not filed the petition or pursued any other remedy in Ecuador because he had suffered what he called "the runaround" from U.S. Embassy officials. The district court determined that Zank's testimony was credible, based in part on the fact that the U.S. State Department has in the meantime labeled Ecuador as not being in compliance with its Hague Convention obligations. The district court, however, did not make any finding that Zank had actually been obstructed by any Ecuadorian officials in his failure to file a Hague petition or that any petition filed by Zank with an Ecuadorian court would ultimately have been futile.

In Ecuador, Lopez Moreno enrolled BLZ in a private school and arranged for her to have language tutoring. BLZ flourished in this environment, participating in a number of extracurricular activities and making many Ecuadorian friends. The district court accordingly determined that, because BLZ had lived so fully in Ecuador from the ages of 3 to 10, she "had been acclimatized to Ecuador and was settled there," such that she would have met the standards for establishing habitual residency in Ecuador.

As Lopez Moreno and BLZ settled into their new Ecuadorian home, tensions between Lopez Moreno and Zank also began to subside. Beginning in 2010, Lopez Moreno first permitted Zank's parents, and then Zank himself, to visit BLZ in Ecuador. Although able to visit BLZ, Zank did not attempt to take BLZ to the United States Embassy, or to pursue a Hague Convention petition in Ecuador during these visits. Zank testified that this apparent lack of effort was because Lopez Moreno required him and his parents to surrender their passports before visiting BLZ.

In 2014, following several of these visits, Lopez Moreno proposed to Zank that they formalize the status of BLZ in Ecuador. In 2010, Lopez Moreno had obtained an ex parte order from an Ecuadorian court prohibiting BLZ from leaving the country, but Zank had not participated in or been a party to that order. Lopez Moreno and Zank therefore began to negotiate, and they ultimately reached an accord between themselves. Under their agreement, Lopez Moreno received full legal custody of BLZ and an increase in Zank's child support payments from $200 to $300 a month, and Zank "waive[d] pursuing further action arising from the arrival of the minor child in Ecuador." In return for his concessions, Zank

received a lifting of the 2010 Ecuadorian court order, and Lopez Moreno's permission to have BLZ visit him in Michigan when not in school in Ecuador.

Lopez Moreno and Zank tell conflicting stories about how they came to reach this agreement. In Lopez Moreno's telling, she decided to resolve her disagreements with Zank after recognizing the harm that the dispute caused to BLZ. In Zank's telling, Lopez Moreno presented him with an ultimatum: agree to her demands or be permanently cut off from BLZ. The district court credited Zank's account over that of Lopez Moreno, as evidenced by the one-sidedness of the agreement towards Lopez Moreno. The court also made a specific determination that Zank "was coerced into making the agreement."

Zank and Lopez Moreno brought the agreement to an Ecuadorian family court for ratification. The Ecuadorian court approved and ratified the agreement, granting permanent custody of BLZ to Lopez Moreno in Ecuador, but permitting BLZ to make temporary visits to Zank in the United States. The district court below noted that the Ecuadorian court was apparently not apprised of the background of the case, including the fact that Lopez Moreno had taken BLZ to Ecuador in violation of the Michigan state court order, or that Zank had attempted (though ultimately failed) to file a petition under the Hague Convention.

Following the Ecuadorian agreement, BLZ made one visit to Zank in Michigan in 2014, without incident. In 2015, before a second visit of BLZ to Zank in Michigan, Lopez Moreno and Zank entered into a second agreement, this one in the United States. This agreement tracked the Ecuadorian agreement: it stipulated that BLZ had "established a life in

Ecuador," that primary custody should be awarded to Lopez Moreno, that BLZ would be allowed to visit Zank in Michigan, and that Zank would pay Lopez Moreno the agreed-upon child support. Lopez Moreno and Zank apparently intended to file this agreement with the Montcalm County Circuit Court, the court that had granted Zank temporary custody of BLZ in 2009 and never revoked Zank's custody of BLZ. The lawyer that Lopez Moreno chose to draw up and file the second agreement apparently bungled the matter, however. The agreement was addressed to an uninvolved Michigan court, the Kent County Circuit Court. In addition, as the district court determined, the version of the agreement entered into the record leaves it unclear as to whether the agreement was actually filed with any court.

In 2016, Lopez Moreno again sent BLZ to visit Zank for the summer. This visit did not go as planned. Zank testified that, during this visit, BLZ told him that Lopez Moreno had physically abused her, by hitting her and throwing a chair at her, and that she did not wish to return to Ecuador. On August 5, 2016, BLZ called Lopez Moreno, and, in a "very fast conversation," BLZ stated that she had learned "the entire truth" about the divorce, believed that Lopez Moreno "was a drug user," and had realized that Lopez Moreno had abducted her to Ecuador. However, BLZ did not explicitly say in this conversation that she would not return to Ecuador. Even so, on August 10, Zank did not place BLZ on a scheduled flight to Florida to visit Walt Disney World with Lopez Moreno's father, and, on August 15, Zank did not place BLZ on a flight scheduled to take BLZ from Michigan back to Ecuador.

On October 10, 2016, Zank filed a petition with the Montcalm County Circuit Court for permanent custody of BLZ. The Friend of the Court investigated Zank's living situation and determined that the best interest of BLZ was for Zank to be granted permanent custody of her, given, among other things, that Lopez Moreno had violated the 2009 custody order and that BLZ voiced a preference for living permanently with Zank. Lopez Moreno was not present in this process, apparently because she had not updated her address with the court when she left for Ecuador. On October 31, 2016, the Montcalm County Circuit Court granted permanent sole custody of BLZ to Zank.

On August 14, 2017, Lopez Moreno filed this Hague Convention petition in U.S. District Court, contending that Zank's retention of BLZ in Michigan was wrongful. The complaint sought the immediate return of BLZ to Ecuador and made the allegation, necessary to relief under the Convention given Lopez Moreno's arguments, that BLZ was a habitual resident of Ecuador. The district court rejected this argument, however. Although the court acknowledged that BLZ had spent such extensive time and maintained such a social connection to Ecuador that she would otherwise be deemed a habitual resident of that nation, it held that "because [Lopez Moreno] abducted BLZ in violation of Michigan law and brought her [to Ecuador] in 2009," she could not have become habitually resident in Ecuador, and that her habitual residence accordingly remained in the United States. The district court proceeded to decide further that, because BLZ maintained habitual residency in the United States, the 2009 custody order continued to apply to BLZ and the subsequent Ecuadorian and American agreements between

Lopez Moreno and Zank did not overcome that custody order. The former did not apply because an Ecuadorian court did not have jurisdiction over an American custody assignment, and the latter did not because there was no evidence that the agreement was ever ratified by the Montcalm County Circuit Court. Lopez Moreno appeals.

Relief under the Hague Convention, as implemented by the International Child Abduction Remedies Act (ICARA), is available only where there is a "removal or retention of a child . . . in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention." Hague Convention on the Civil Aspects of International Child Abduction, Art. 3, Oct. 25, 1980, T.I.A.S. No. 11,670. U.S. law provides for a cause of action for the return of a child where a petitioner establishes that the "child has been wrongfully removed or retained within the meaning of the Convention." 22 U.S.C. § 9003(e)(1).

The central issue in this case is whether *Lopez Moreno's* questionable removal of BLZ from Michigan to Ecuador *in 2009* precluded the possibility that BLZ had become habitually resident in Ecuador for purposes of Lopez Moreno's Hague Convention challenge to *Zank's* retention of BLZ in Michigan *in 2016*. If the answer is yes, and BLZ was a habitual resident of Michigan in 2016, then Lopez Moreno could get no relief under the Convention,[1] and that is the

[1] Relief under the Convention requires a showing that a removal or retention is contrary to the law of the state of habitual residence, and Lopez Moreno makes no argument that Zank's retention of BLZ violated Michigan law.

end of the case because such relief under the Convention is all that her complaint sought. If the answer is no, and BLZ in 2016 was a habitual resident of Ecuador for Hague Convention purposes, then that conclusion destroys the basis for the remainder of the district court's analysis examining whether Zank's retention of BLZ in 2016 was a breach of United States law. Accordingly, we do not need to address that latter analysis, and it is sufficient on this appeal for us to resolve only the determinative habitual residence issue. When reviewing a Hague Convention petition claiming that a child was wrongfully abducted from a previous residence, "a court in the abducted-to nation has jurisdiction to decide the merits of an abduction claim, but not the merits of the underlying custody dispute." *Friedrich v. Friedrich* (*Friedrich II*), 78 F.3d 1060, 1063 (6th Cir. 1996).

The Hague Convention requires the return of a child wrongfully removed or retained contrary to "the law of the State in which the child was habitually resident," Hague Abduction Convention, Art. 3, but the Convention does not itself define the term "habitual residence." We have held that, for children above the age of cognizance, *cf. Ahmed v. Ahmed,* 867 F.3d 682, 689 (6th Cir. 2017), a habitual residence is "the nation where, at the time of [her] removal, the child has been present long enough to allow 'acclimatization,' and where this presence has a 'degree of settled purpose from the child's perspective.'" *Robert v. Tesson*, 507 F.3d 981, 993 (6th Cir. 2007) (quoting *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995)). Lopez Moreno argues that Ecuador meets that standard here, and so qualifies as BLZ's habitual residence.

The district court found that, by 2016, Ecuador met all requirements to have become BLZ's habitual residence, given that she had lived there continuously since the age of three, and maintained an active social, familial, and academic life in that nation. Zank does not challenge the facts underlying this conclusion, and the assessment is clearly correct. From BLZ's perspective, at the time of Zank's retention of her in the United States, Ecuador was the place in which she possessed all degrees of settled purpose. The only basis for deciding that BLZ was not habitually resident in Ecuador in 2016 is the purported illegality of Lopez Moreno's actions in 2009 in taking BLZ to Ecuador in the first place. But that is not enough to trump the acclimatization standard, at least where Zank failed to pursue all treaty-based remedies in Ecuador to secure BLZ's return to the United States.

The object and purpose of the Hague Convention is to provide an international legal scheme to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Hague Abduction Convention, Preamble. The Convention accordingly seeks to avoid the harms to a child's well-being that come from being torn from the surroundings to which the child has been accustomed. *See id.*; *see also* H.R. Rep. No. 100-525 (1988), at 5, *reprinted in* 1988 U.S.C.C.A.N. 386, 386–87. States party to the Convention therefore undertake to return a wrongfully taken child when proceedings are brought promptly, subject to certain exceptions related to the child's welfare and desires. The Convention also allows a person seeking relief to bring these proceedings without the assistance of State agents by

"applying directly to the judicial or administrative authorities of a Contracting State." Hague Abduction Convention, Art. 29.

Therefore, if Convention procedures are not fully pursued when a child is first abducted, it makes little sense to categorically permit later self-help abduction in the other direction, after the child has been acclimatized in the second country. First, permitting re-abduction results in a total disregard for the limits that the Convention puts on the remedy for the first abduction, such as time limits,[2] and exceptions for the child's welfare or mature preference. Second, permitting abduction for a second time carries the same threat to the child's well-being of being torn from an accustomed residence. The Convention scheme achieves its purposes only if Convention processes are applied, with applicable exceptions, each time a child is abducted from a country in which the child has been acclimatized. The rule applied by the district court in this case is not consistent with such a scheme.

At least two of our sister circuits have come to a similar conclusion. The Eleventh Circuit recently addressed the situation of a child who was born in the United States, was taken by the mother to Guatemala in what the father believed was a wrongful manner, and then was kidnapped back to the United States by the father. *Ovalle v. Perez*, 681 F. App'x 777, 779 (11th Cir. 2017). The *Ovalle* court

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[2] A petition must be filed within one year of removal, or else significant defenses to a return order apply. *See, e.g., Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1229 (2014) (citing Hague Abduction Convention, Art. 12).

held that the child's habitual residence was in Guatemala, at least for purposes of the mother's subsequent Hague petition seeking to remedy the re-abduction, given the father's reliance on self-help, and, in part, his "failure to 'pursue his legal remedy' under the Hague Convention." *Id.* at 783 (quoting *Kijowska v. Haines*, 463 F.3d 583, 588–89 (7th Cir. 2006)). In *Kijowska*, the Seventh Circuit provided the following alternative reasoning for its determination that a child brought to Poland and subsequently retained there was a habitual resident of that nation:

> Suppose that [the child]'s habitual residence when her mother took her to Poland in December 2004 was the United States and that [her mother]'s removal of her was wrongful. [The father]'s remedy would have been to file a petition under the Hague Convention and its implementing federal statute. He did not do that. He merely sought a custody order from an Illinois state court and then used that order to help obtain the self-help remedy of taking the child from the airport. To give a legal advantage to an abductor who has a perfectly good legal remedy in lieu of abduction yet failed to pursue it would be contrary to the Hague Convention's goal of discouraging abductions by denying to the abductor any legal advantage from the abduction. By failing to pursue his legal remedy, [the father] enabled [the child] to obtain a habitual residence in the country to which her mother took her, even if the initial taking was wrongful. For as we have seen, there is no doubt that if the circumstances in which [the child] was taken to Poland are set to one

> side, by May 2005 she was indeed a habitual resident of Poland.

Kijowska, 463 F.3d at 588–89.

Zank seeks to defend the district court's decision based on a statement in our decision in *Friedrich I*, that a fundamental purpose of the Hague Convention is to "deter parents from crossing international boundaries in search of a more sympathetic court." *Friedrich v. Friedrich* (*Friedrich I*), 983 F.2d 1396, 1400 (6th Cir. 1993). But *Friedrich I* did not deal with the situation here. We said in *Friedrich I* that "the change in geography must occur before the questionable removal . . . . If we were to determine that by removing [a child] from his habitual residence without [one parent]'s knowledge or consent [the other parent] 'altered' [the child]'s habitual residence, we would render the Convention meaningless." *Id.* at 1402. Here, by contrast, the relevant change in geography clearly preceded the removal or retention being questioned, that is, the subsequent retention by Zank. It is very different to say that in the *absence* of a Hague Convention suit, the nonsuing parent can use self-help much later, and be free from suit by the parent who never had the chance to defend against such a previous petition, with whatever defenses might properly have been available then.

The other cases cited by Zank also do not support what the district court did in this case. *See Miller v. Miller*, 240 F.3d 392, 400 (4th Cir. 2001); *Kijowska*, 463 F.3d 588–89; *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir. 1995). *Miller*'s statement about the effect of a previous wrongful removal was dicta in light of that case's holding that there was no initial wrongful removal or retention there. *See*

Miller, 240 F.3d at 401. *Kijowska*, as noted above, directly supports our analysis. In *Nunez-Escudero*, the Eighth Circuit rejected an argument that habitual residence follows the mother, citing our language in *Friedrich I*. *See Nunez-Escudero*, 58 F.3d at 379 (citing *Friedrich I*, 983 F.2d at 1402).

We do not address the situation where someone in Zank's position actually filed a Hague petition in Ecuador. Here, Zank brought no such case in Ecuador. Zank testified that he meant to file a Hague petition, but did not do so because he encountered what he calls "the runaround" from officials at the U.S. Embassy in Ecuador. Any lack of help by U.S. embassy officials is clearly not enough to say that Zank could not have brought an action in an Ecuadorian court. The record is also not sufficient to overcome our general presumption about the adequacy of remedies available in a country that is party to the Hague Convention. We also do not address the situation where a properly filed Hague petition was denied. But in that situation a U.S. court would presumably at least give that Ecuadorian decision substantial deference. *See Diorinou v. Mezitis*, 237 F.3d 133, 143 (2d Cir. 2001).

This is also not a case that raises the issue of what a U.S. court should do when a treaty partner renounces, or consistently violates, a treaty that is implemented by statute. Although the district court credited a report from the U.S. Department of State indicating that Ecuador has been delinquent in its Hague obligations since 2014, the report says nothing about Ecuador's compliance with the Convention in 2009 or 2010. Such a report does not absolve Zank of his obligation to fully pursue all available Hague

Convention procedures in Ecuador, including filing a petition with the Ecuadorian courts.

Our holding that Ecuador was the habitual residence of BLZ in 2016 does not automatically mean that Zank must return her now. Just as Lopez Moreno could have raised defenses to a Hague Convention case had one been brought in Ecuador, Zank can raise such defenses in this case on remand. Several such defenses were raised by Zank in the district court below, but the district court had no occasion to reach them. For instance, Zank contended below that Lopez Moreno had failed to file the petition within the one-year limit following the wrongful retention, because Zank contended that this retention began on August 10, when Zank did not place BLZ on the flight to Florida. If Zank is correct, then under the Convention return to Ecuador would not be required if BLZ had become "settled" in Michigan, because the Hague Convention does not require return after a year if "it is demonstrated that the child is now settled in its new environment." Hague Abduction Convention, Art. 12. In addition, a district court hearing a Hague petition may refuse to return a child otherwise required to be returned if "the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." *Simcox v. Simcox*, 511 F.3d 594, 603 (6th Cir. 2007) (citing Hague Abduction Convention, Art. 13). In this case, BLZ was born in 2006 and may therefore possess the age and maturity to have her views taken into account. We have held that the maturity defense is a case-specific one, and requires specific fact-finding by the trial court as to the ability of the child to form those wishes. *See id.* At oral argument in this appeal, counsel for Lopez Moreno agreed that such arguments could be

addressed in the district court should Lopez Moreno succeed in obtaining a remand.

We therefore remand this case to the district court for a first evaluation of Zank's defenses against Lopez Moreno's prima facie Hague Convention case. Such a remand is warranted because these defenses are all fact-intensive ones, generally requiring specific and detailed fact-finding by the district court. *See Friedrich II*, 78 F.3d at 1067.

The judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LIZ LORENA LOPEZ MORENO,	)	
	)	
Petitioner,	)	No. 1:17-cv-732
	)	
-v-	)	
	)	Honorable Paul L. Maloney
JASON MICHAEL ZANK,	)	
	)	
Respondent.	)	
	)	

OPINION

Petitioner Liz Lorena Lopez Moreno filed this action against Respondent Jason Michael Zank on August 14, 2017, seeking immediate return of their minor child ("BLZ") to Ecuador, under the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention") and the International Child Abduction Remedies Act (ICARA), 22 U.S.C. § 9001, *et seq*. Liz contends that Jason wrongfully retained BLZ after a trip to Michigan in the Summer of 2016 because his retention of the child allegedly violated an Ecuadoran court order from 2014. Therefore, she says that BLZ must be returned to Ecuador. As will be explained, the Court finds that Liz has not established a prima facie case of wrongful retention under the Convention. Thus, the Court will deny the Petition.

Procedural Posture

Liz filed the relevant petition on August 14, 2017. Jason answered on September 14, 2017. The Court determined that an evidentiary hearing was necessary and held a two-day hearing over

September 28–29, 2017. After the hearing, the parties filed simultaneously closing briefs and reply briefs. The Court has reviewed the written submissions and determined that no further briefing or oral argument is necessary for resolution of the Petition.

Findings of Fact

The Court makes the following findings of fact:

Liz Lorena Lopez Moreno is a citizen of Ecuador, and Jason Zank is a citizen of the United States. Liz came to the United States on an education visa as an exchange student in the early 2000s. They began a romantic relationship, culminating in their marriage in Michigan in 2003. BLZ was born to Jason and Liz in Greenville, Michigan in 2006 and is now 11 years old.

Jason and Liz's relationship deteriorated, and Jason filed for divorce in Montcalm County Court in December of 2008. The divorce was finalized in July of 2009. As part of the divorce decree, the Montcalm County Court ordered Liz and Jason to share joint legal and physical custody of BLZ and ordered the parties to alternate weekly custody, with additional visitation twice a week for each parent. The divorce decree also allowed Liz to visit Ecuador with BLZ with 60 days advance notice to Jason.

One Sunday in December of 2009, Liz failed to return BLZ to Jason at the ordinary time. Jason contacted his attorney and law enforcement. He also notified the United States Embassy because he was concerned that Liz had left the country. He was right. Liz had absconded with BLZ and returned to Ecuador in violation of the Montcalm County divorce decree and child custody order. Approximately five days later, Jason sought and received an ex parte

order from the Montcalm County Court, temporarily granting him sole legal and physical custody of BLZ until a full hearing could be held. Soon after, Jason contacted the United States State Department, Office of Children's Issues to begin the process of returning BLZ to the United States. He then completed a Hague petition with the United States Embassy in Ecuador. (Resp's Ex. E-1, Hague Pet.) However, Jason encountered "difficulties" going through the Hague Convention process. He testified that "[he] thought [he] got the runaround nonstop . . . [the United States Embassy in Ecuador] could never provide us with good answers . . . it's like they weren't sure how to handle the situation. (ECF No. 12 at PageID.138.) At the evidentiary hearing, the Court admitted into evidence a report authored by the State Department indicating that Ecuador has been cited as non-compliant with the Hague Convention procedures since 2014, lending credibility to Jason's own experiences with the Ecuadoran government through 2009 and 2010. (*See* Resp's Ex. C, Department of State, *Annual Report on International Child Abduction* (2017)). The non-action of the petition stymied Jason's progress, and although he asked a couple attorneys around town some questions, he did not continue to pursue the Hague petition through 2010.

Meanwhile, Liz was settling back in to life in Ecuador with BLZ. She testified that she obtained an order from a court in Ecuador in February of 2010 that prevented BLZ from leaving the country. (ECF No. 12 at PageID.247.) As BLZ grew up, she was enrolled in a prestigious private school in Ecuador, and Liz and Liz's parents arranged for further instruction with a private tutor. BLZ also expressed interest in a wide variety of social and

extracurricular activities and participated in a number of them. (ECF No. 12 at PageID.237.)

A few months after taking BLZ, Liz began allowing Jason to communicate with BLZ via telephone or Skype, and the relationships between Jason and Liz's families improved. In September of 2010, Jason's parents, Julie ("Ms. Zank") and Mike Zank, visited BLZ in Ecuador. They stayed with Liz's mother and her husband, Fernando. Ms. Zank testified at the evidentiary hearing that when they would visit BLZ, they were required to surrender their passports to Fernando (ECF No. 12 at PageID.185), presumably to prevent the Zanks from trying to leave the country with BLZ.

In March of 2011, Jason made his first trip to Ecuador to see BLZ with his parents. (ECF No. 12 at PageID.170.) They stayed with Fernando for part of the week and spent the remainder at a resort in another area of Ecuador. Jason's parents continued making yearly trips to Ecuador to spend time with BLZ, and Jason made about five trips to Ecuador between 2011 and 2016. While in Ecuador, Jason never attempted to go to the authorities or otherwise revive his efforts to return BLZ to the United States.

One of Jason's other trips to Ecuador occurred in the summer of 2014, but this trip was different. Jason claims that Liz told him that, if he wanted to remain part of his daughter's life, he would sign an agreement with her, granting her full custody of BLZ. (*Id*. at PageID.143). In exchange, Liz would allow BLZ to visit Jason in the United States. Liz disputes his account. According to her, the communication between them was getting better, and they agreed to an arrangement that would be in BLZ's best interest. She said, "In 2014 after a couple of

days when Jason was visiting with [his parents] with my daughter, I sat with him to talk[,] both of us alone. And we reached this agreement. He wrote what he wanted, I wrote what I wanted, and we reach[ed] an agreement that I would not talk bad about him, he wouldn't talk bad about me. And that this agreement [was] for the best, or the well-being of my daughter—our daughter." (*Id*. at PageID.223.)

After reaching an agreement, Liz and Jason took it to the Ecuadoran courts. Each side was represented by an attorney, but the Ecuadoran court apparently was not apprised of Liz kidnapping BLZ, the 2009 Montcalm court order, or Jason's Hague petition. The agreement purported to transfer jurisdiction of the case to Ecuador and grant Liz full legal and physical custody of BLZ. Jason's child support payments were also increased from $200 per month to $300 per month. In return, Jason received Liz's permission to have BLZ visit him in the United States over the summer when BLZ was not in school. Jason also "waive[d] pursuing further action arising from the arrival of the minor child into Ecuador, in accordance with American laws." The Ecuadoran court approved the agreement (the "2014 Ecuadoran Order").

After the agreement was signed, BLZ visited Jason and his parents over her Christmas break in 2014 and returned for a second visit in July of 2015. But before BLZ returned in July of 2015, Jason and Liz entered into a second agreement, this time in the United States (the "2015 Stipulation"). Ms. Zank had requested the assistance of attorney Robert Alvarez to put something in writing to memorialize the 2014 Ecuadoran Agreement to protect the Zank family's continued access to BLZ in the United States. (ECF

No. 12 at PageID.101–02.) At this time, Alvarez was already representing Liz. Evidently, Alvarez did not regard his representation of Liz to be a problem, because he drafted the requested document and accepted payment from the Zank family. (*Id*. at PageID.155.) On June 24, 2015, Jason and Julie went to Alvarez's office to sign the documents that Alvarez prepared. Jason testified that he did not sign any type of conflict waiver and was not informed of the risks of Alvarez jointly representing both he and Liz.[1] (*Id*. at PageID.155.)

The documents were submitted to this Court at the evidentiary hearing and admitted into evidence. (*See* ECF No. 16-3). The 2015 Stipulation was intended to be submitted to the Montcalm County Court to inform that court that Liz "shall be awarded sole physical and legal custody of BLZ" and to obtain an order to that effect. (ECF No. 16-3 at PageID.351.) In essence, the 2015 Stipulation was supposed to inform the Montcalm County Court that the parties had stripped it of jurisdiction by consenting to the proceedings in Ecuador. However, the caption of the 2015 Stipulation lists Kent County and the address of the Kent County Court, and there is

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[1] Frankly, the Court finds Mr. Alvarez and Ms. Grauman's conduct to push the boundaries of ethical representation. By representing both parties to the 2015 Stipulation and subsequently representing Liz in this matter, it would appear to the Court that Alvarez and Grauman created significant conflicts of interest. *See* Michigan Rules of Professional Conduct 1.7, 1.9. However, the focus of the evidentiary hearing was on the merits of Liz's Hague Petition. Further inquiry into any violation of the Michigan Rules of Professional Conduct is within the jurisdiction of the State Bar of Michigan.

no indication that the Montcalm County Court ever actually received the stipulation. (ECF No. 12 at PageID.106.)

After the 2015 Stipulation was signed, BLZ came to visit the Zank family in Michigan in July of 2015. She returned to Ecuador without issue at the end of August.

Jason and Liz again arranged for BLZ to spend the summer in Michigan in 2016. They agreed that BLZ would travel to Michigan after she finished her school year in July, and would remain with Jason until she was to go back to school in the middle of August. They further planned for BLZ to meet Fernando in Florida to go to Disney World before returning to Ecuador. Jason was supposed to put BLZ on a plane to Florida on August 10, 2016. However, Liz testified that she received a phone call from BLZ on August 5, 2016.

She said that "[i]t was horrible. [BLZ] called me, it was a very fast conversation. She told me her dad, her grandparents and his family have told her the entire truth about our divorce, that I was a drug user, that I had taken her from [the United States] to come [to Ecuador] and not to see her dad. She was thoroughly poisoned." (ECF No. 12 at PageID.234.) Liz further testified that she asked if BLZ didn't want to come back and if she didn't want to go to Disney. BLZ told her that she didn't know and hung up. (*Id*.) Five days later, there was a problem with the Delta flight from Michigan to Florida, and BLZ remained with Jason. Jason also did not put BLZ on her flight back to Ecuador on August 15, 2016.

Liz began the Hague Petition process in Ecuador on August 24, 2016 after not hearing from Jason. On

October 31, 2016, Jason sought an order from the Montcalm County Court awarding him full custody of BLZ. Liz did not appear. The notice was sent to Liz's old Michigan address, although Jason claimed to have informed that court that Liz lived in Ecuador, but also that he didn't know her exact address. In the briefing, Jason faults Liz for not keeping the Montcalm County Court apprised of her address, and Liz faults Jason for not tracking down her new address and supplying it to the court. Jason also testified that he may have mentioned the 2014 Ecuadoran Court Order in the 2016 proceedings but that he did not have a copy of the order and did not know its exact terms. The Montcalm County Court granted Jason full custody of BLZ.

BLZ remains in Jason's custody in Greenville, Michigan and has now begun her second year of schooling in the United States. She is in sixth grade.

Legal Framework

Both the United States and Ecuador are signatories to the Hague Convention, which seeks "(1) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (2) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States." Hague Conv., art. 3. The Convention aims to deter "the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child." Elisa Perez–Vera, Explanatory Report, P. 11, 3 *Hague Conference on Private Int'l Law, Acts and Documents of the Fourteenth Session*,

Child Abduction 426, 428 (1982).[2] In other words, "the primary purpose of the Hague Convention is to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court." *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) (hereinafter "*Friedrich I*").

When deciding an action brought under the Hague Convention, a federal court has subject matter jurisdiction to decide "the merits of an abduction claim . . . not the merits of the underlying custody claim." *Id*. (citing Hague Conv., art. 19).

Under ICARA, the petitioner has the burden of proving by a preponderance of the evidence "that the child has been wrongfully removed or retained within the meaning of the [Hague] Convention." 22 U.S.C. § 9003(e)(1)(A). The removal or the retention of a child is to be considered wrongful where—

> [I]t is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention . . . .

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[2] Elisa Perez–Vera was the official Hague Conference reporter. *Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001). The Hague Convention recognizes the Perez–Vera report "as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10503 (1986).

Hague Conv., art. 3. Therefore, the Court must determine whether Petitioner has proven the following elements by a preponderance of the evidence:

1. Whether the child was habitually resident in another country before the allegedly wrongful removal or retention;
2. Whether the removal or retention was a breach of custody rights under the laws of the country where the child was habitually resident;
3. Whether the Petitioner was exercising custody rights at the time of the removal or retention; and
4. Whether the child is under the age of 16.

If the Petitioner meets that burden, the burden shifts to the Respondent to show that one of the following narrow exceptions applies such that the child should not be returned:

1) that the removal proceeding was commenced more than one year after the removal and the child has become settled in the new environment. Hague Conv., art. 12;

2) the Petitioner had consented or acquiesced in the removal or retention. Hague Conv., art. 13a;

3) there is a grave risk that return of the child would expose the child to physical or psychological harm. Hague Conv., art. 13b;

4) returning the child would violate fundamental principles relating to the protection of human rights and fundamental freedoms. Hague Conv., art. 13b; or

> 5) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views

Hague Conv., art. 12, 13a, and 13b; *Friedrich I*, 983 F.2d at 1400.

Conclusions of Law

The Court must first determine BLZ's habitual residence to determine whether Jason violated the Hague Convention when he retained her in August of 2016. Unfortunately, neither the Convention nor ICARA offers a definition of the phrase "habitual residence." Neither has the Supreme Court opined on its meaning. However, the Sixth Circuit has dealt with the concept on several occasions, and its insights will guide the Court.

A person can have only one habitual residence. *Friedrich I*, 983 F.2d at 1401. Habitual residence should not be mistaken as an alternative term for the legal concept of domicile. *Id*. A determination must focus on past experience, not future intentions. *Id*. In a departure from other Circuits, the subjective intent of the child's parents is irrelevant in the Sixth Circuit. Instead, "habitual residence can be 'altered' only by a change in geography and the passage of time. . . . The change in geography must occur before the questionable removal." *Id*. (emphasis added).

In other cases, the Sixth Circuit has instructed that trial courts should consider a child's habitual residence to be "the nation where, at the time of [a wrongful removal or retention], the child has been present long enough to allow acclimatization, and where this presence has a 'degree of settled purpose from the child's perspective." *Jenkins v. Jenkins*, 569

F.3d 549, 556 (6th Cir. 2009) (quoting *Robert v. Tesson*, 507 F.3d 981, 993 (6th Cir. 2007)). The Court is further guided by consideration of a number of factors:

> [A]cademic activities are among the most central . . . in a child's life and therefore highly suggestive of acclimatization. The court also noted that social engagements, participation in sports programs and excursions, and meaningful connections with the people and places in the child's new country all point to the child being acclimatized.

Roberts, 507 F.3d at 996. At the evidentiary hearing, the Court heard a great deal of testimony involving BLZ's academic studies and social involvement both in the United States and Ecuador. BLZ was enrolled in a private school in Ecuador and had regular sessions with a tutor. She was also participating in extracurricular activities and making other meaningful connections with friends and family in Ecuador. In sum, the Court concludes that, having lived in Ecuador from the time she was 3 years old until she was 10, she had been acclimatized to Ecuador and was settled there.

However, a fundamental purpose of the Hague Convention is to "deter parents from crossing international boundaries in search of a more sympathetic court." *Friedrich I*, 983 F.2d at 1400. Accordingly, the removal of a child without the knowledge or consent of the other parent cannot alter the child's habitual residence. *Id*. at 1401 (concluding that the Convention would be "rendered meaningless" and "create an open invitation for all parents to abduct their children" if wrongful removals could alter habitual residence).

Other circuits agree that "[a] parent cannot create a new habitual residence by wrongfully removing and sequestering a child." *Miller v. Miller*, 240 F.3d 392 (4th Cir. 2001) (quoting *Diorinou v. Mezitis*, 237 F.3d 133, 141–42 (2d Cir. 2001)); *see also Kijowska v. Haines*, 463 F.3d 583, 587 (7th Cir. 2006) (concluding that wrongful removal and sequestering cannot create a new habitual residence because it would "invite abduction"); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir. 1995) (concluding that the Hague Convention does not "reward an abducting parent").

Accordingly, BLZ's habitual residence cannot be Ecuador, because Liz abducted BLZ in violation of Michigan law and brought her there in 2009. The fact that Liz immediately obtained an order from an Ecuadoran court forbidding BLZ from leaving the country is further proof that Liz crossed an "international boundary in search of a more sympathetic court." *Friedrich I*, 983 F.2d at 1400. Therefore, because BLZ was not habitually resident in Ecuador, her habitual residence remained the United States, where she was born and raised until she was kidnapped by Liz in 2009.

Having determined that BLZ's habitual residence to be the United States, the Court must now determine whether Jason's retention of BLZ in 2016 was a breach of Liz's custody rights as determined by the laws of the United States. There are three documents or court orders that could plausibly alter the status of custody over BLZ. In 2009, Jason was awarded temporary full legal and physical custody after Liz left the United States with BLZ. In 2014, an Ecuadoran court purported to take jurisdiction over the custody dispute pursuant to a stipulation by the parties and granted Liz full custody of BLZ. In 2015,

the parties entered into a second stipulation, to be filed with the Montcalm County Court that Ecuador would assume jurisdiction over all future custody disputes and that Liz would take full custody of BLZ.

If either the 2014 Ecuadoran Order or 2015 Stipulation are given legal effect under the laws of the United States, then Jason's retention of BLZ violated the Hague Convention. However, the Court concludes that Montcalm County had exclusive and continuing jurisdiction over all custody disputes involving BLZ under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and that the individual parties cannot stipulate their way into the subject matter jurisdiction of another court. Therefore, neither the 2014 Ecuadoran Order nor the 2015 Stipulation could modify the existing child custody order of the Montcalm County Court.

Montcalm County acquired exclusive jurisdiction over all child custody disputes relating to BLZ once it made its first custody determination as part of the divorce decree in July of 2009. *See* MCL 722.1202(1).

Under the UCCJEA, jurisdiction is "continuing" until one of a few things happens. The Montcalm County court must either: (1) determine that neither the child nor the child and one parent have a significant connection with Michigan and that evidence is no longer available in Michigan concerning the child's care, protection, training, and personal relationships; or (2) a Michigan court or court of another state determined that neither the child nor a parent of the child presently resided in Michigan. MCL 722.1202(1)(a)–(b). The Court could also relinquish jurisdiction if it determined that it was an inconvenient forum. MCL 922.1202(b)(2).

None of these things happened. At all times from 2009 to 2016, Montcalm County retained jurisdiction because Jason remained a Michigan resident. *See Jamil v. Jahan*, 760 N.W.2d 266, 271 (Mich. Ct. App. 2008) (holding that if either parent to a child remains in the home state, the original court within the home state retains jurisdiction under the UCCJEA). To date, Montcalm County has not made a determination that it no longer has jurisdiction. Accordingly, it remained the exclusive and continuing court of jurisdiction for matters involving Jason and Liz's respective custody rights of BLZ.

In light of Montcalm County's continuing jurisdiction, it is clear that the 2014 Ecuadoran Order cannot be enforced. The UCCJEA governs subject matter jurisdiction over child custody disputes. MCL 722.1201. Subject matter jurisdiction can be thought of as the authority or empowerment of a particular court to do a particular thing. *E.g.*, *In re Knox*, 660 N.W.2d 777 (Mich. Ct. App. 2003) ("Subject matter jurisdiction pertains to the court's abstract power over a class of cases . . . ." (internal quotations omitted)). Here, the only court that was empowered or authorized to modify Liz and Jason's child custody arrangement was the Montcalm County Court, which was authorized by the UCCJEA.

Further, it is widely accepted that parties cannot stipulate to the subject matter jurisdiction of a particular court. *See, e.g.*, *In re Hatcher*, 505 N.W.2d 834, 838 (Mich. 1993) ("[S]ubject matter jurisdiction cannot be conferred on the court by the consent of the parties."). Within the UCCJEA context, one of the official comments to the model version of the UCCJEA makes it clear that "since jurisdiction to make a child custody determination is subject matter

jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective." UCCJEA § 201 cmt. 2.

Therefore, when Liz and Jason sat down and hashed out a modification of their child custody arrangement and took it to an Ecuadoran court for ratification, it had no legal effect. The Ecuadoran court lacked jurisdiction. Under ICARA, courts of the United States are ordinarily required to accord full faith and credit to foreign judgments relating to Hague Convention petitions as a matter of comity. 22 U.S.C. § 9003(g). However, it is clear that the Ecuadoran court never viewed the matter as a Hague Petition. It instead treated the case like an ordinary child custody dispute—not one involving wrongful removal of children across international borders. It also lacked subject matter jurisdiction, as noted above, and therefore could not issue an order modifying Liz and Jason's custody arrangement. And even if that court had subject matter jurisdiction, the Court credits Jason's account of the "negotiations" that led to the 2014 Ecuadoran Order. The Court concludes that he was coerced into making the agreement when Liz threatened to cut off all access to BLZ if he did not submit to her demands. This is corroborated by the increase in child support payments, and it excuses his failure to notify his Ecuadoran attorney or the Ecuadoran court of the true circumstances of the custody dispute. Accordingly, the 2014 order had no legal effect and cannot provide the basis for a breach of custody rights.

The 2015 Agreement is also void because "contract principles do not govern child custody matters."[3] *Phillips v. Jordan*, 614 N.W.2d 183, 188 (Mich. Ct. App. 2000). In Michigan, the courts have a duty to review proposed changes in child custody to determine whether the changes would be in the best interests of the child. MCL 722.27(1)(c). The Courts may not "blindly accept the stipulation of the parents, but must independently determine what is in the best interests of the child." *Id.* (citing *Lombardo v. Lombardo*, 507 N.W.2d 788 (Mich. 1993)). There is no indication that Montcalm County ever considered the 2015 Stipulation, let alone that it determined it to be in the best interests of the child. Accordingly, Jason's retention of the child could not breach Liz's custody rights created by the 2015 Stipulation because it is a legal nullity.

Therefore, the Court determines that the 2009 Montcalm County court order awarding Jason temporary custody of BLZ pending a full hearing on the matter has remained effective at all times. Jason

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[3] As the Court indicated previously, everything about the 2015 Stipulation is deeply troubling. While the record was not fully developed on this point, the testimony indicates that Alvarez's firm accepted payment from Julie and Jason Zank—who even at the time were adverse to his client, Liz Lopez Moreno—to draft a document that he knew or should have known could have no legal effect, given the holdings of *Phillips* and *Lombardo*. Further, there is no indication that the document *was even filed* with the Montcalm County Court. Apart from the significant ethical conundrum the case appears to present, there is a second question—whether Alvarez and Grauman met the standard of care when they drafted a legal nullity, at the behest of an adverse party, and then failed to file it with the intended court.

did not wrongfully retain BLZ when he did not put her on a flight back to Ecuador in August of 2016. Accordingly, Liz cannot make a prima facie case for BLZ under the Convention.[4] Therefore, her Petition will be denied. Any further child custody proceedings relating to BLZ must be brought with the Montcalm County Court for as long as it retains exclusive and continuous jurisdiction over the action.

There is one last matter that requires the Court's attention. In his briefing, Jason asked to be awarded with attorney's fees and costs, should he prevail on the petition. However, the text of ICARA allows only a prevailing *petitioner* to recover costs. 22 U.S.C. § 9007. Jason is the respondent. While he argues that "the district courts are accorded broad discretion in awarding costs and fees," a review of the case law from around the country confirms that prevailing respondents are not generally entitled to attorney's fees. *See, e.g.*, *White v. White*, 893 F. Supp. 2d 755, 759(E.D. Va. 2012) (collecting cases). Therefore, the Court, in its discretion, declines to award attorney's fees or costs in this matter.

ORDER

IT IS HEREBY ORDERED that Liz Lorena Lopez Moreno's Petition, pursuant to the Hague Convention and International Child Abduction Remedies Act, is **DENIED**.

IT IS FURTHER ORDERED that any subsequent disputes of child custody are exclusively within

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[4] Because the Court concludes that Liz has not met her burden, the Court declines to rule on whether Jason's affirmative defenses would prevent an order for BLZ's return to Ecuador.

the jurisdiction of the Montcalm County Court, unless and until it or another court determines that it no longer has jurisdiction over the matter under the UCCJEA.

IT IS SO ORDERED.

Date: November 15, 2017

/s/ Paul L. Maloney
Paul L. Maloney
United States
District Judge

No. 17-2397

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LIZ LORENA LOPEZ MORENO, Petitioner-Appellant, v. JASON MICHAEL ZANK, Defendant-Appellee.	)	**FILED** Aug 23, 2018 DEBORAH S. HUNT, Clerk ORDER

BEFORE: KEITH, ROGERS, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk